No. 18,275

IN THE

United States Court of Appeals

For the Ninth Circuit

RAYMOND L. STOVER, et al.,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR THE APPELLEE

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APPENDIX

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I. JURISDICTIONAL STATEMENT

The jurisdiction of the Trial Court was based on the Federal Tort Claims Act (Title 28, U.S. Code, Section 1346(b) et seq.).

The jurisdiction of this Court on appeal from the decision of the Trial Court—which is reported at 204 F. Supp. 477 (1962)—is based on Title 28, U.S. Code, Sections 1291 and 1294.

II. STATEMENT OF THE CASE

The one issue before the Trial Court was whether the affirmative defense of the appellee under the portion of Section 702c, Title 33, U.S. Code, reading:

> "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place. . . ."

exempted it from liability to the appellants in these consolidated cases. After receiving evidence as to the facts, hearing argument as to the law, and considering the memoranda of the respective parties, the Trial Court held, *inter alia,* that:

> (1) The waters which had inundated the appellants' lands were part of a flood within the meaning of the terms "floods or flood waters" as used in said statute; and
>
> (2) Section 702*c* therefore provided the United States a complete legal defense to the actions. (Clerk's Transcript of Record, Conclusion No. 7, p. 77; Nos. 8 and 9, p. 37; 204 F. Supp. 477, at 485.)

The Trial Court ordered that judgment be entered accordingly in favor of the United States of America. The present appeal followed in due course.

In their "Statement of the Case," the appellants set forth a number of factual and procedural matters and contentions as to certain rulings of the Trial Court. These will be discussed separately under the following subheadings:

A. As to the Facts

The appellants state some of the pertinent facts from the decision of the Court below (Op. Br., pp. 2-7). They omit, however, certain other pertinent facts which show the magnitude of the rainfall and streamflow in the Feather River basin during the critical month of De-

cember 1955. For a full understanding of all of the facts which are pertinent to the legal issues here involved, the entire portion of the Trial Court decision under the heading "I—The Facts" should be considered (Cl. Tr., pp. 64-68; 80-81; 204 F. Supp. 477, at 478-481). The following excerpt therefrom is particularly important:

> "A comparison of the precipitation received in December, 1955, with that recorded over the previous 50 years at specified locations within the Feather River basin indicates the abnormal extent of rainfall which preceded the inundations.[4] During the period of *one week* preceding the levee breaks, the Feather River basin received nearly 200% of the *monthly* normal precipitation (This in a month that is regularly rainy).[5] This deluge arrived at a time when the ground was still saturated from the storms of earlier in the month, which meant that the amount of water run-off would be greatly increased as the capacity of the ground for water absorption decreased.
>
> "Turning away from a comparison with prior averages and norms, and looking to previous specific

"[4] It is important to note that the Nicolaus break occurred on December 23 shortly after noon, and that the Gum Tree break followed at approximately 12:10 a.m. on December 24. The record does not indicate the precise time at which the Western Pacific Interceptor Canal breaks occurred. With these dates in mind, the following precipitation figures indicate the extent of rainfall occurring which could have been involved in, and connected with, the breaks.

Drainage Area	Rainfall during specified times of the month			Monthly Normal
	1st-22nd	15th-22nd	23rd	
Feather River	19.57	14.60	2.77	7.95
Yuba River	24.91	17.59	4.66	9.57
Bear River	18.24	12.45	3.40	7.37"

"[5] Considering the fact that the Feather River basin is a heavy rainfall belt, it is noteworthy that the amount of precipitation received in that area during the two-week period of December 15–28 ranged from 40% to 65% of normal *for the entire year.*"

weather conditions which had caused floods, the month of December, 1955, appears as a singularly extraordinary period of weather phenomena. The records of the 16 rain-gauging stations with records extending back at least to 1915 were received in evidence, with a tabulation of the 'maximum annual five consecutive day precipitation amounts' indicated. Of these 16 stations, the five consecutive day maximum precipitation amounts in December, 1955 (the particular period involved was, in most cases, December 19 through December 23[6]), were the highest of record at 10 stations, the second highest at 4 stations, the third highest at 1 station, and the fourth highest at 1 station. At the stations where December, 1955, was not the highest of record, there was no other single year in which the maximum for those stations coincided during the same storm period.[7]

"In addition to the extraordinary precipitation which took place during the month of December, 1955, and connected therewith, was the magnitude of the streamflow emerging from the mountains and foothills onto the valley floor. The readings of three of the stream-gauging stations which recorded the flow are particularly significant, since they are located at the foothill line of the streams that flow into the lower basin, rather than up in the watershed, and are relatively unaffected by the upstream works of man.[8]

"[6] From December 19 through December 23, the average precipitation measured in inches at the gauging stations throughout the basin amounted to 15.41 for the Feather River drainage area, 20.31 for the Yuba River drainage area, and 14.39 for the Bear River drainage area. One station registered, in a five-day period, 27.49 inches of precipitation, more than 8 inches over the preceding high."

"[7] Most of the preceding maximums occurred at times which have generally been accepted as the times of previous 'floods.' The most common periods of previous highs were November, 1950; February, 1940; and December, 1929."

"[8] The selected gauging stations are located on the Feather River near Oroville, on the Yuba River at Englebright Dam, and on the Bear River near Wheatland."

"During the month of December, 1955, the stream flow of the Feather River, at the gauging station near Oroville, increased from a rate of approximately 5,000 c.f.s. (cubic feet per second) at the beginning of the month, through successively higher peaks which culminated in a peak flow of 203,000 c.f.s. on December 23. Similar increases in stream flow occurred on the Yuba River (peaking at 148,000 c.f.s. on December 23) and the Bear River (peaking at 33,000 c.f.s. on December 22). These flows were the maximum, or near the maximum, of record. The Feather River near Oroville had the second highest peak during the 59 years of record.[9] On the Yuba River, the flood peak was some 40% higher than had occurred during the 57 years of record prior to December, 1955. On the Bear River, the flood peak was the highest in 56 years of record.

"Correlative with the recordings of streamflow are the records of the river stage levels during this period. Similar findings attend a reading of such records. In each case, the stage level at the gauging stations of the Feather, Yuba and Bear Rivers, and their tributaries, were either at or near the highest which had been recorded.[10]

"Although the most definitive studies were made at the three above-mentioned gauging stations, simi-

"[9] On March 19, 1907, during the floods of that year, the discharge rate at the Oroville gauging station was 230,000 c.f.s."

"[10] The following river stage readings were taken during the events here involved, and compare with previous recordings at the same stations. These readings are indicative, but not exhaustive, of the readings at all the stations throughout the basin.

River and Gauging Station	December, 1955 Reading	Previous Maximum
Feather River near Oroville	76.77	73.6 (Dec., 1937)
Feather River at Nicolaus	51.60	47.80 (Nov., 1950)
Yuba River at Englebright Dam	17.73	14.69 (Nov., 1950)
Yuba River at Marysville	82.5	71.27 (Nov., 1950)
Bear River near Wheatland	19.30	20.83 (Nov., 1950)"

lar results were noted at all of the gauging stations in the lower Feather River basin."

The text and footnotes of the Trial Court show with precise facts and statistics from the record that the rainfall, the resulting streamflow, and the various river stages in the Feather River basin were meteorological and hydrological events of enormous magnitude—the largest in over a half century of record at most locations. Of particular significance is footnote 10 showing, among others, the streamflow at the three foothill gauging stations mentioned in footnote 8, since those stations are situated at or shortly upstream from the points where the rivers emerged from the Sierra and entered the levee system of the Sacramento River Flood Control Project. The flow records at those stations show that the flows of water at each were of such a high order of magnitude that a flood occurred by any reasonable definition of the term and irrespective of the entry of the water into the levee system.[1] It is essential that these facts—which the appellants do not contest—be fully recognized in considering the issues which the appellants raise in their Opening Brief and our discussion thereof in the following portions of this Brief for the Appellee.

B. As to Procedure

The appellants refer to various procedural steps in the trial—but omit mention of the discovery and pretrial proceedings through which the consolidated actions were developed and the affirmative defense of the appel-

[1] The findings of fact by the Trial Court (Cl. Tr., p. 76 and 36-37; 204 F. Supp. 477, at 484-485)" are derived directly from the evidence presented by the appellee at trial. For further reference, see the Topical Index of Evidence in the Appendix hereto.

lee under Section 702c, Title 33, U.S. Code, was separated for trial and determination in advance of other issues. These important details—showing the full presentation on behalf of the respective parties and thorough consideration by the Trial Court—were stated in the Pre-Trial Order which was entered on November 21, 1961 (Cl. Tr. pp. 92-103) and referred to in the final decision at pages 478, 482, and 484 of 204 F. Supp.[2]

The appellants also omit mention of their application of November 30, 1961 to this Court for permission to appeal from the Pre-Trial Order under Title 28, U.S. Code, Section 1292(b). In that application, the appellants presented the same arguments they had made to the Trial Court and are again making here as to the affirmative defense of the appellee under Section 702c (Docket No. 17658 in this Court). In that application, the appellants contended, *inter alia,* that the decision of this Court in *Clark v. United States,* 218 F.2d 446 (1954), upon which the Pre-Trial Order was expressly based, was erroneous and inapplicable to these consolidated cases. While the denial of the application was made without comment by this Court, it is significant in view of the appellants' challenge to the decision in *Clark.*

Throughout their Statement of the Case and in subsequent portions of their Opening Brief, the appellants criticize various rulings made by the Trial Court during the pre-trial and trial proceedings. We not only disagree with such criticism, but also point out that it disregards the final paragraph of the decision below under "I—The Law," wherein the Court observed:

[2] Compare proceedings in *Clark* v. *United States,* 13 F.R.D. 342 and 109 F.Supp. 213 (1952), noted by this Court in its decision on appeal—218 F.2d 446, at 448 (1954).

> "There well may be some statements in the record of this case which appear to be, or in fact actually are, inconsistent with the position which I now take. If such there be, they are not to be taken as being final expression of my views. My final views are expressed in this memorandum." (Cl. Tr. pp. 75-76; 204 F. Supp. 477, at 484.)

In the light of this statement by the Trial Court, the criticism by the appellants is clearly unwarranted and need not be considered herein.

C. As to Contentions

At the conclusion of their Statement of the Case, the appellants concede that there was a flood in the Feather River basin in December 1955 which caused the damages for which they seek to recover from the appellee (Op. Br., pp. 6-7). The appellants then contend, however, that the key point of the case is not whether there was a flood but whether that flood was natural or "man-made." The mistake in this contention is clearly shown by the facts of record, upon which the decision below was based. There was certainly no element of "man-made" flood in the events of December 1955 which are here involved. To interpose the concept of "man-made" into those events is an obvious contrivance. In one way or another, all activities attributable to the United States in a tort claim action necessarily involve some activities of man. Any attempt to categorize the flood which is here involved as "man-made" or "non-man-made" is simply diversionary and not determinative of the meaning and applicability of the portion of Section 702c, Title 33, U.S. Code, upon which the affirmative defense of the appellee herein depends.

In contrast, the appellee contends—on the bases of the decisions in the *Clark* case, *supra*, and *National Mfg. Co.* v. *United States,* 210 F.2d 263 (1954), certiorari denied 347 U.S. 967 (1954)—that the issue to be resolved in the present litigation is not whether any activities of man or of the United States were involved in the events which occurred in the Feather River basin in December 1955, but whether the waters therein were floods or flood waters within the meaning of said portion of Section 702c. As the decision of the Trial Court clearly shows under "I—The Facts," *supra*, those waters were floods or flood waters by any concept or definition when they emerged from the Sierra and became confined within the levee system of the Sacramento River Flood Control Project. Certainly they did not thereafter change or lose their character as floods or flood waters, nor bar the affirmative defense of the appellee under the provisions of Section 702c, Title 33, U.S. Code.

III. SPECIFICATION OF ERRORS

Under this heading, the appellants assert various "errors" of the Trial Court upon which they purportedly rely on appeal, and comment and argue thereon. In the succeeding section entitled "IV—Argument," the appellants assert an apparently different ground as their "basic contention" and confine their argument thereto, without reference the "errors" previously asserted in "III—Specifications of Errors." To avoid confusion, the several contentions will here be discussed in the order in which they appear under the respective headings in the appellants' Opening Brief.

A. The appellants first assert that the Trial Court erred in holding Title 33, U.S. Code, Section 702c, to

be an immunity statute (Op. Br., pp. 7-12). This assertion not only mis-states the holding of the Trial Court, but misconceives the nature of Section 702c as defined by this Court in *Clark, supra,* and by the Eighth Circuit in *National Mfg., supra.*

In *Clark,* this Court stated at page 452 of 218 F.2d:

> ". . . The provision of 33 U.S.C.A. § 702c barring liability 'from or by floods or flood waters' expresses a policy that any federal aid to the local authorities in charge of flood control shall be conditioned upon federal non-liability. To base recovery here on any act or omission of the Engineers in assisting in the fight against this flood would run counter to the policy thus expressed. See *National Mfg. Co.* v. *United States,* 8 Cir., 1954, 210 F.2d 263, 270-275, certiorari denied, 347 U.S. 967, 74 S.Ct. 778."

In *National Mfg.,* the Eighth Circuit stated at pages 270-271 of 210 F.2d:

> "1. The bar of Section 3 of the 1928 Act. [Sec. 702c, Title 33, U.S. Code.]
>
> "The 1928 flood control Act authorizing appropriations in excess of $300,000,000 for flood control work on the Mississippi River provided for the preparation and submission to Congress of 'projects for flood control on all tributary streams of the Mississippi River system subject to destructive floods' including 'the Missouri River and tributaries.' 33 U.S.C.A. § 702j. In the later Flood Control Act of June 22, 1936, 49 Stat. 1570, 1588, Congress 'adopted and authorized to be prosecuted' as 'works of improvement, for the benefit of navigation and the control of destructive flood waters and other purposes' hundreds of flood control projects

in all parts of the country including 'levees and flood walls to protect people and city property' and 'Kansas Citys on Missouri and Kansas Rivers in Missouri and Kansas.' Congress also affirmed the application to the 1936 Act of the general provisions of the 1928 Act including Section 3 by providing, Sec. 8, that:

> " 'Nothing in this Act shall be construed as repealing or amending any provision of the Act entitled "An Act for the control of floods on the Mississippi River and its tributaries, and for other purposes," approved May 15, 1928, or any provision of any law amendatory thereof.' 33 U.S.C.A. § 701e.

[1] Thus it appears on inspection of the two flood control Acts referred to that when Congress entered upon flood control on the great scale contemplated by the Acts it safeguarded the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language. The cost of the flood control works itself would inevitably be very great and Congress plainly manifested its will that those costs should not have the flood damages that will inevitably recur added to them. Undoubtedly floods which have traditionally been deemed 'Acts of God' wreak the greatest property destruction of all natural catastrophies and where floods occur after flood control work has been done and relied on the damages are vastly increased. But there is no question of the power and right of Congress to keep the government entirely free from liability when floods occur, notwithstanding the great government works undertaken to minimize them. Congress included Section 3 in the 1928 Act and carried it forward

into the 1936 Act and others with intent to exercise that power completely and to absolutely bar any such federal liability.

"It was not indicated in the 1928 Act that Congress expected to carry on the federal flood control projects without imposing upon the United States certain obligations to affected owners of property. The constitutional prohibition against the taking of private property for public use without just compensation was kept in view, U. S. v. Sponenbarger, 308 U.S. 256, 60 S.Ct. 225, 84 L.Ed. 230, and provision for compensation to be paid to landowners in certain circumstances is contained in the same section 3 which prohibits any federal liability for damage from or by floods or flood waters. [Footnote quoting Section 702c omitted.] The Federal Tort Claims Act of August 2, 1946, had not been passed in 1928 or 1936 and the government then had a certain sovereign immunity from suit for torts but when Section 3 is read in its context it is clear Congress meant by it that damages from or by floods or flood waters should not afford any basis of liability against the United States regardless of whether the sovereign immunity was availed of or not. The declaration of Section 3 negates the existence of a cause of action against the United States in the situation covered by it.

"Undoubtedly that absolute freedom of the government from liability for flood damages is and has been a factor of the greatest importance in the extent to which Congress has been and is willing to make appropriations for flood control and to engage in costly undertakings to reduce flood damages."

The following excerpt from the separate concurring

opinion of Circuit Judge Johnsen in *National Mfg.* should also be noted in this regard:

> "To me, there are two fundamental grounds of non-liability here, and I would avoid any possible weakening of their emphasis by the discussion of other contentions.
>
> "The first is the absolute policy which Congress has expressly declared, that 'No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.' 33 U.S.C.A. § 702c. This unmistakable and long-established policy can not soundly be regarded, I think, as having been repealed by implication, in the enactment of the Federal Tort Claims Act, 28 U.S.C.A. §§ 1346, 2671 et seq., on the basis of any surrendering indication in either the Act's general language or its legislative history. But this ground is fully covered in the court's opinion, and I shall not discuss it further." (P. 279 of 210 F.2d.)

From the foregoing, it is clear that the portion of Section 702c on which the affirmative defense of the appellee depends is not based on sovereign immunity, but is a Congressional declaration of the long-established public policy of non-liability upon which Federal participation in flood control work has always been conditioned.[3]

There is nothing in the present record or in the appellants' contentions to warrant modification or reversal of the decisions in *Clark* or *National Mfg.* or any of the prior decisions cited therein. Accordingly, the decision here on appeal—which was based primarily on *Clark* and *National Mfg.*—should not be disturbed.

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[3] For further background, see also: Pp. 108-111 of the USA's Brief to this Court in *Clark*, and pp. 20-21 of the USA's Brief to the Eighth Circuit in *National Mfg.*, which are included in the Appendix and discussed hereinafter.

B. The appellants' next assert that the Trial Court erred in holding that proximate cause was not an issue in these consolidated cases (Op. Br., pp. 12-15). In support of the assertion, the appellants quote at page 15, a paragraph from the decision below (Cl. Tr., pp. 71-72; 204 F. Supp. 477, at 482-483). The quoted paragraph is based upon the decision in *National Mfg., supra,* wherein the Eighth Circuit stated in pertinent part:

> "The plaintiffs in these actions argue that negligence of government employees was a proximate cause of their damages but they include in their complaints that the damages involved resulted from the fact their goods, wares, and merchandise 'were flooded and inundated by the waters and oil, mud, muck, and debris carried therewith and * * * were damaged, ruined, and destroyed' (National's complaint). In the Shipley Company's complaint it is alleged that 'the said Kaw river' 'flooded the said Central Industrial District and destroyed and damaged the personal property of the plaintiff.' Some such allegations are necessary to present the cases. But it is in just such a situation that the language of Section 3 plainly bars recovery against the United States. The section does not limit the bar against such recovery to cases where floods or flood waters are the sole cause of damages. It does bar liability of any kind from damages 'by' floods or flood waters but it goes further and in addition it bars liability for damages that result (even indirectly) 'from' floods. The use of the word 'from' in addition to 'by' makes it clear that the bar against federal liability for damages is made to apply wherever floods or flood waters have been substantial and material factors in destroying or damaging

property. The language used shows Congressional anticipation that it will be claimed after the happening of floods that neligence of government employees was a proximate cause of damages where floods or flood waters have destroyed or damaged goods. But the section prohibits government liability of 'any kind' and at 'any place.' So that uniformly and throughout the country at any place where there is damage 'from' or 'by' a flood or flood waters in spite of and notwithstanding federal flood control works no liability of any kind may attach to or rest upon the United States therefor." (210 F.2d 263, at 271.)

As noted above, the Supreme Court denied certiorari in *National Mfg.* at 347 U.S. 967.[4]

We submit accordingly that the holdings of both the Trial Court herein and the Eighth Circuit in *National Mfg.* on the question of proximate cause are correct and should not be disturbed by this Court.

C. Thirdly, the appellants assert that the Trial Court erred in refusing to receive any evidence on the issue of whether the flood here in question was a "man-made" flood (Op. Br., pp. 16-25). This assertion is apparently based on the distinction between natural and "man-made" floods first suggested in *Atkinson v. Merritt, Chapman, & Scott Corp. et al.,* 126 F. Supp. 406 (N.D. Calif. 1954) which is discussed below at pages 22-23 of this brief.

The appellants particularly complain that their offers of proof on such issue were denied by the Trial Court.

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[4] For further background, see the excerpts from pages 19-20 of the USA Brief to the Eighth Circuit in *National Mfg.,* which are included in the Appendix hereto.

The appellants cite no reasons or authorities in support of such offers—nor could they properly, in view of the decisions of this Court in *Clark,* and the Eighth Circuit in *National Mfg.,* set forth above, especially the concluding sentences in each.

Moreover, the evidentiary value of most of the appellants' offers of proof is seriously questionable—even assuming such offers could be proved—since the proof would only further emphasize that the waters involved were "floods or flood waters" within the scope of Section 702c, as the Trial Court ultimately concluded. (See No. 7—Cl. Tr., p. 77; 204 F.2d 477, at 485; and No. 8 in the Conclusions of Law entered May 29, 1962—Cl. Tr., p. 37.) For example, appellants' principal contention in this regard is essentially that they were prevented from proving that a claimed 58,000 c.f.s. of water, which would have flowed out of the natural banks of the Feather River at Hamilton Bend upstream from the appellants' properties, was retained in the levee system until the breaks at Gum Tree and Nicolaus, whereupon those waters flooded the appellants' lands (Items l, m, n, p, p plus, q, r, s, t, u, and v—Op. Br., pages 19-22). Presumably, therefore, the appellants here contend that the waters so retained by the levees was the "proximate cause" of the levee breaks downstream from Hamilton Bend and near the appellants' lands. The appellants were thus merely offering to prove that water in excess of the capacity of the natural channel of the Feather River was confined by levees. But that is precisely what any levee system is intended to do—i.e., retain water in the system which would otherwise overflow the natural banks of the river and flood surrounding areas. The Trial Court ultimately found and concluded that

the waters so retained in the Feather River were "flood waters":

> "2. Prior to December 23, 1955, certain waters had overflowed the natural banks of the Feather, Yuba and Bear Rivers, and were being contained by a system of levees, which constituted part of the Sacramento River Flood Control Project.
>
> * * *
>
> "3. Water which has overflowed the natural banks of the stream in its natural channel, and which is contained by a system of levees, is 'flood water.' "[5]

If, as the appellants contend, such waters "proximately caused" the damage of which they complain, the situation is clearly within the scope of Section 702c, and the appellants' offers of proof defeat themselves.

Certain of the other offers apparently sought to prove that various levees were "negligently constructed" in one respect or another by the appellee (Items w, x, y, z, aa, and ab on page 22 of appellants' Opening Brief). Again, before such "negligent construction" could be relevant to the appellee's affirmative defense under Section 702c, the water necessarily would have had to been confined to the river by the levees. Such water would be water which, *except for the levees,* would have flowed beyond the natural banks of the river and would thus be flood waters. To have allowed the appellants to prove such matters would have neither changed the fact that the waters involved were "floods or flood waters" nor have affected the affirmative defense of the appellee. As the Trial Court observed, quoting from the testimony of

[5] Cl. Tr., pp. 76, 77; 204 F.Supp. 477, at 485, repeated as Finding No. 4 and Conclusion No. 4, respectively, in those entered May 29, 1962 (Cl. Tr., pp. 35, 36).

the appellee's expert witness, Professor Ray K. Linsley, Executive Head of the Department of Civil Engineering at Stanford University:

> "The rains resulted in run-off, an increase of streamflow from a low flow on the Feather River at the beginning of the month of under 5,000 cubic feet per second to a peak of slightly over 200,000 cubic feet per second, which hydrologists would certainly consider a flood event. The channels were filled with water above their natural banks; water was on the levees, and again * * * this we would consider a flood." (Cl. Tr., p. 68; 204 F. Supp. 477, at 481.)

Under the *Clark* and *National Mfg.* decisions, *supra,* it is clear that the Trial Court properly refused to receive any evidence on the issue of whether the flood here involved was "man-made."

IV. ARGUMENT

Under "A" of this portion of their Opening Brief, the appellants assert that their "basic contention" is that Title 33, U.S. Code, Section 702*c*, is a legislative recognition that the United States is not liable for damage proximately caused *solely* by an act of the elements, but does not prevent liability on the part of the United States where its negligence is either the *sole* proximate cause of damage, or proximately causes damage whether or not combined with an act of the elements or an "Act of God."

While it is not at all clear whether this "basic contention" is intended to supersede, supplement, or merely restate the contentions asserted in the preceding portions of the appellants' Opening Brief and discussed at pages

8 et seq., hereinabove, it is obvious that the appellants' *basic error* lies in their failure or refusal to accept the definitive decisions of this Court in the *Clark* case and of the Eighth Circuit in *National Mfg.* case (in which the Supreme Court later denied certiorari).

The appellants next discuss under "B" of their Opening Brief, what they term the "Congressional History of 33 USC 702"—apparently to dispute the conclusions of the Trial Court as to the meaning of the portion of Section 702*c* upon which the affirmative defense of the appellee is based (Op. Br., pp. 25-39).

Review of the excerpts from the legislative history cited by the appellants shows that they concern other portions of the bill involving other topics—particularly compensation for overflow or floodage rights rather than for flood damages—and are consequently irrelevant here. Significantly, none of such excerpts even mention the portion of Section 702*c* which is here involved, nor the discussion thereof in either the House of Representatives or the Senate.

The pertinent portion of Section 702*c* was introduced as a recommended amendment by the House Flood Committee while the bill (S. 3740) was under consideration by the House of Representatives sitting as a Committee of the Whole. The introduction, discussion, and adoption of that portion appear on pages 7022-7023 of Volume 69, Congressional Record (April 23, 1928), commencing with the following in the first column of page 7022:

> "The CHAIRMAN. [Mr. REID of Illinois] The Clerk will report the next amendment.
>
> "The Clerk read as follows:

"Page 4, line 22, after subparagraph (c) already adopted, add a new paragraph at the end of the section, as follows:

" 'No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.' "

and concluding with the following from the second column on page 7023:

"The CHAIRMAN. . . . The question is on the amendment offered by the gentleman from Tennessee [Mr. GARRETT] to the amendment offered by the gentleman from Illinois, chairman of the committee.

"The question was taken; and on a division (demanded by Mr. GARRETT of Tennessee) there were 111 ayes and 70 noes.

"So the amendment of Mr. GARRETT of Tennessee to the amendment was agreed to.

"The CHAIRMAN. The question recurs on the amendment of the gentleman from Illinois as amended by the amendment of the gentleman from Tennessee.

"The question was taken, and the amendment as amended was agreed to."

The photocopies of these pages of the Congressional Record, which are included in the Appendix hereto, show that the particular language was adopted as proposed by the House Flood Control Committee—without change.

Following adoption by the House, the particular provision and the additional proposal by Representative Garrett were referred to as "House Amendment No. 14" in conference reports to the House and Senate—respec-

tively, H. Rept. No. 1505, H. Rept. No. 1555, and Sen. Doc. No. 96, 70th Cong., 1st Sess.—as follows:

> "No. 14 inserts the language proposed by the House but changes the latter part of the last paragraph of the section, so as to clarify the meaning."

Review of the debate and discussion of the bill in the Senate shows that House Amendment No. 14 was accepted without question—see 69 Cong. Rec. 8172; 8179-82; 8184-93 (May 9, 1928).[6]

It is apparent from the foregoing that once the language as to non-liability of any kind of the United States for floods or flood waters at any place was written into the bill, that language remained unchanged and subject to its natural meaning within its normal context—not to qualifications as the appellants urge.

As shown by the excerpts in the Appendix hereto, the legislative history of Section 702*c* was fully presented in the brief of the United States to this Court in the *Clark* case, *supra,* and those to the Eighth Circuit and to the Supreme Court in the *National Mfg.* case, *supra.*[7] The Eighth Circuit expressly relied on such legislative history in its decision in *National Mfg.*—from which it may be presumed that the action of the Supreme Court in denying certiorari therein was based, *pro tanto,* on that legislative history. Certainly, the peripheral argument of the appellants—based as it is on random excerpts from Congressional discussions of other por-

[6] The references to "Senate discussions" on p. 33 of the appellants' Opening Brief are mistaken. Messrs. *Reid* and *Wilson* were not Senators, but members of the House of Representatives—speaking before that body—on other provisions of the bill—as cited pp. 8122 and 8211 of 69 Cong. Rec. clearly show.

[7] The excerpt quoted by the Eighth Circuit at pp. 272-273 of 210 F.2d in *National Mfg.* pertained to the consideration and rejection by Congress of bills to satisfy the claims of flood damage in the July 1951 flood of the Kansas River which were there involved.

tions of the statute—should not prevail against the legislative history of the particular portion of Section 702*c* involved herein, and upon which the decisions in *Clark* and *National Mfg.* were based and which the Court below followed in its decision.

As to the "Case History of Section 702c"—which the appellants discuss under "C" at pages 40-54 of their Opening Brief—it is to be noted that except for *Atkinson* v. *Merritt, Chapman & Scott Corp., et al., supra,* the decisions have all upheld the same defense under that section which the appellee has raised in the present litigation.

The *Atkinson* case—which the appellants discuss at pages 52-53 and 55 of their Opening Brief—involved damages resulting from the failure of a temporary cofferdam in the bed of the American River during the construction of Folsom Dam. As the Court below observed, that was an entirely different factual situation from damages resulting from floods and flood waters to areas beyond river banks and protective levees as in the present cases (Cl. Tr., p. 72; 204 F. Supp. 477, at 483). The decision in *Atkinson* was an interlocutory ruling on a contested motion for summary judgment. The motion was denied in order to permit the taking of evidence on the disputed facts. The case was eventually concluded as to the United States when the plaintiff voluntarily dismissed as against the United States. Thus, all that the decision in *Atkinson* actually represents is that whether a flood occurred is a matter of fact which the Court in that case could not properly determine on the contested motion for summary judgment. The distinction between natural and "man-made" floods which is suggested therein is not supported by the legislative

history or by any other court decision under Section 702c.

As to the "Flood cases which have recognized the liability of the United States for flood damage" which the appellants discuss at pages 55-65 of their Opening Brief, it should be noted that Section 702c was involved in only one such case—*Atkinson,* which we have discussed above. The other cases have no applicability to the present litigation, and require no further comment.

However, one of the others—*Aycrigg* v. *United States,* unreported, Civ. No. 6299, N.D. Calif. N.D. (1952), which the appellants discuss at pages 59-60 of their Opening Brief—may be mentioned in passing since it arose from a previous flood of the Feather River and was tried before the late Judge Dal M. Lemmon in the same District Court as the present cases. The *Aycrigg* case was not brought under a statute of general application but was specially authorized by Congress in Private Law No. 35, 81st Cong., 1st Sess., Ch. 86 (63 Stat. 1088). Private Law 35 waived the so-called "Tucker Act" jurisdiction of the U.S. Court of Claims and permitted the plaintiffs to sue in the District Court for flood damages allegedly resulting from negligence of the Corps of Engineers, U.S. Army. The very fact that a private law was necessary to create jurisdiction in the District Court and to waive the normal non-liability of the United States in such cases, in itself answers the appellants' contentions that such damages are ordinarily recoverable.[8]

[8] The appellants' assertion in the second paragraph on page 59 of their Opening Brief to the effect that more water flowed down the Feather River in the 1937 flood than in the 1955 flood is incorrect. As the Trial Court observed, it is necessary to go back nearly 50 years—to 1907—to find a larger flow in the Feather River than occurred in December 1955. (See text of decision and footnote 9 at p. 5, *supra.*).

In the appellants' discussion of "The Meaning of Section 702c" under "D" at pages 65-67 of their Opening Brief, it is contended that in order to establish a defense under Section 702c, the appellee must have proved that the damage to the appellants' property would have occurred if the flood control project had not been built. This is obviously a self-serving argument without foundation except in the appellants' own misinterpretation of the legislative history and court decisions under Section 702c. By this argument, the appellants would limit the application of Section 702c to situations in which the United States would not be liable —even without any such statutory provision. Such an argument is entirely contrary to the decisions of this Court in the *Clark* case and the Eighth Circuit in the *National Mfg.* case (in which the Supreme Court denied certiorari). The decision here on appeal was based on those decisions, is equally correct, and should not be modified or reversed because of the appellants' unfounded contentions to the contrary.

Likewise, the "Constitutionality of Section 702c"—which the appellants discuss under "E" at pages 69-74 of their Opening Brief—was considered and sustained in both the *Clark* and *National Mfg.* cases. The public policy asserted by Congress in Section 702c, which was based on prior statutes and practice over the years (as noted in the legislative history set forth in the Appendix hereto), and also in the numerous court decisions both before and after the enactment of Section 702c in 1928 (as discussed by this Court in *Clark* and the Eighth Circuit in *National Mfg.*), should not now be seriously questioned. The appellants' reliance on random expressions, principally from dissenting opinions, in the deci-

sions quoted on pages 72 and 73 of their Opening Brief —none of which involved Section 702c—certainly provides no basis for questioning the constitutionality of that section.

V. CONCLUSION

The appellants conclude their Opening Brief by asserting that Congress did not intend that the "innocent victims of such preposterous conduct" as that of the appellee in completing the Sacramento Flood Control Project at Hamilton Bend in the summer of 1955 "should bear the full financial burden of the Government's misconduct" (Op. Br., pp. 74-75). Further, that the Trial Court was erroneous in its interpretation of Section 702c of Title 33, U.S. Code. As we have shown herein, neither assertion is warranted on the facts or the law.

The appellants' Opening Brief neither comments upon nor attempts to refute any of the evidence presented by the appellee at trial as to the pertinent events here involved—i.e., the quantities of precipitation and streamflow, and the time and other circumstances of their occurrence. The only portion of their Opening Brief that even mentions those events appears under the heading "II—Statement of the Case," where it is conceded that the appellee proved there was a flood in the Feather River basin in December 1955 (Op. Br., pp. 2-6).

In brief, the testimony and exhibits presented by the appellee showed that the waters of the Feather, Yuba, and Bear Rivers as they emerged from the foothills on to the valley floor were of such magnitude and characteristics as to constitute "floods or flood waters" within any concept or definition. These waters did not cease

to be floods or flood waters merely because the United States undertook to confine them by flood control works. The waters were thus within the scope of the statutory terms which Congress used in Section 702c to bar recovery from the United States for any damage from or by such waters at any place.

We respectfully submit, therefore, that the Trial Court was correct in its interpretation and its application of Section 702c, and that its decision should be affirmed by this Court.

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WILLIAM B. SPOHN,
Assistant United States Attorney,
Attorneys for the Appellee.

CERTIFICATE OF COUNSEL

I certify that, in preparing this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the brief is in full compliance with those rules.

May 15, 1963.

WILLIAM B. SPOHN,
Attorney for the Appellee.

Appendix

Topical Index of Evidence

A. Re GEOGRAPHIC AREA and general description of flood in December 1955:

Testimony and exhibits by witness Jack L. Newman, Supervising Civil Engineer, U. S. Army, Corps of Engineers, Sacramento: Reporter's Transcript of Trial Proceedings (Vol. II of Clerk's Transcript), pp. 318-355; Exhs. A thru I.

B. Re PERTINENT WEATHER EVENTS:

Testimony and exhibits by witness Lloyd H. Magar, Meteorologist-in-Charge, U. S. Weather Bureau, Sacramento: Rep. Tr., pp. 355-550; Exhs. O, Q, U, V, W, and X.

C. Re PERTINENT STREAMFLOW EVENTS:

Testimony and exhibits by witness Walter Hofmann, District Engineer, Surface Water Branch, U. S. Geological Survey, Menlo Park: Rep. Tr., pp. 551-593; Exhs. R, S, and Y.

D. Re SIGNIFICANCE OF WEATHER AND STREAMFLOW EVENTS:

Testimony of Ray K. Linsley, Professor and Executive Head of the Department of Civil Engineering, Stanford University, Palo Alto: Rep. Tr., pp. 593-660.

Appendix

Legislative History, etc., of Title 33, U. S. Code, Section 702c.

(Excerpt from pages 108 through 118 of USA brief to 9th Circuit in *Clark* v. *United States*, 218 F.2d 446 (1954)).

G. Congress Has Provided That the United States Shall Not Be Liable for Flood Damage.

Claims against the United States on account of flood damage are not novel. Floods are one of the most persistent of the nation's problems. The loss is frequently tremendous. The 1948 Columbia River flood caused damage estimated at one hundred million dollars. The property loss in the recent Kansas City flood was approximately two and one-half billion dollars. "The average annual losses from flood damage in the United States have been estimated from 100 to 500 million dollars * * *" (H. Rep. No. 1088, 82d Cong. 1st Sess., p. 6). Congress has always been unwilling to become responsible for flood damage. In response to a suggestion that the Government undertake an indemnity program for the victims of the Kansas City flood, the House Committee said:

> "The budget request includes a proposal to indemnify flood victims for physical loss of or damage to tangible real or personal property up to 80 percent of the amount of such loss, provided that the amount to be paid any one person submitting such a claim does not exceed $20,000. [p. 108]* The Committee heard considerable testimony on this recommendation, and after careful deliberation has not approved it for several important reasons.
>
> "Congress has never appropriated funds for

*Figures in brackets indicate end of page in original brief.

indemnities such as have been proposed here in any previous disaster of this kind, and no legislation has ever been enacted by Congress authorizing such appropriations. This would be a major departure from the present concept of Government and, therefore, must be given more extensive study than is now possible under emergency conditions that demand prompt action on the part of the Congress. The Committee believes that the approval of the proposed indemnification program would commit the Federal Government to a new concept of Federal responsibility which would result in an almost unlimited number of claims from victims of every 'Act of God' disaster throughout the country regardless of the type or size of the disaster. The financial implications inherent in such an action would be enormous." (H. Rep. No. 1092, 82d Cong. 1st Sess., p. 5.)

The courts have been as unwilling as Congress to "commit the Federal Government to a new concept of Federal responsibility which would result in an almost unlimited number of claims from victims of every 'Act of God' disaster." For many years and in a wide variety of circumstances, claims have been filed under the Fifth Amendment seeking compensation for damage caused by the Government's [p. 109] flood control operations. They have always been denied. *Bedford v. United States,* 192 U.S. 217, 224 (1904); *Jackson v. United States,* 230 U.S. 1, 23 (1913); *Cubbins v. Mississippi River Commission,* 241 U.S. 351 (1916); *Sanguinetti v. United States,* 264 U.S. 146 (1924); *United States v. Sponenbarger,* 308 U.S. 256 (1939); *Oklahoma v. Atkinson Co.,* 313

U.S. 508 (1941); *Gulf Refining Co. v. Mark C. Walker & Son Co.,* 124 F.2d 420 (C.C.A. 6, 1943); *United States v. West Virginia Power Co.,* 122 F.2d 733 (C.C.A. 4, 1941); *Goodman v. United States,* 113 F.2d 914 (C.C.A. 8, 1940); *Lynn v. United States,* 110 F.2d 586 (C.C.A. 5, 1940); *Franklin v. United States,* 101 F.2d 459 (C.C.A. 6, 1939). This is true even though the Federal officers, as an emergency measure, have dynamited levees, thereby inundating plaintiffs' property. *Hughes v. United States,* 230 U.S. 24 (1913); *Danforth v. United States,* 308 U.S. 271, 287 (1939).

This result does not depend upon doctrines of sovereign immunity or limitations in the Fifth Amendment. The Tennessee Valley Authority is subject to suit. Nevertheless, flood damage claims against it, even though asserted in terms of negligence or wrongful conduct, cannot be maintained. See *Grant v. T.V.A.,* 49 F. Supp. 564, 566 (1942). *Atchley v. T.V.A.,* 69 F. Supp. 953, 954 (1947). The decisive considerations are those of public policy. As Mr. Justice McKenna said in *Bedford v. United States,* 192 U.S. 217, 223 (1904): [p. 110]

> "The consequences of the contention immediately challenge its soundness. What is its limit? * * * And if the government is responsible to one landowner below the works, why not to all landowners? The principle contended for seems necessarily wrong. * * * Conceding the power of the government over navigable rivers, it would make that power impossible of exercise, or would prevent its exercise by the dread of an immeasurable responsibility."

To the extent that flood damage claims are founded upon the Fifth Amendment, they are, of course, beyond Congressional control. In the area, however, in which Congress is free to act, including the area of these cases, Congress has unequivocally forbidden recognition of such claims. The Court below concluded:

> "19. The provision of 33 U.S.C.A. 702(c) that 'No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place' is an absolute defense to these actions. The statute is valid; it is applicable to the Columbia River; and it was not repealed by the Federal Tort Claims Act."

In denying recognition to any claim against the United States on account of flood damage, Congress was unequivocal and emphatic. And Congress meant exactly what it said.

Federal flood control legislation in this country goes back to 1851. In the general appropriation act [p. 111] for that year Congress provided $50,000 "For the topographical and hydrographical survey of the Delta of the Mississippi * * *" (9 Stat. 523, 539). In 1879 the Mississippi River Commission was created and obligated to prepare for Congress "such plan or plans and estimates as will correct, permanently locate, and deepen the channel and protect the banks of the Mississippi River; improve and give safety and ease to the navigation thereof; prevent destructive floods; promote and facilitate commerce, trade, and the postal service; * * *" (21 Stat. 37, 38). In

1893 Congress created the California Debris Commission and instructed it to look into problems of navigability and flood control on California rivers (27 Stat. 507). In 1917 by an Act "To provide for the control of the floods of the Mississippi River and of the Sacramento River, California," Congress appropriated forty-five million dollars to be expended for flood control purposes (at the rate of ten million dollars a year) under the direction of the Secretary of War and in accordance with plans of the Mississippi River Commission and the California Debris Commission (39 Stat. 948). And thus the matter stood until 1927.

In 1927 the Mississippi Valley was devastated by its flood of record. Congress immediately gave consideration to flood control measures, culminating in the Flood Control Act of 1928 (45 Stat. 534) entitled "An Act for the Control of floods on the Mississippi River and its tributaries, and for other purposes." [p. 112] Section 1 establishes a board of engineers to study Mississippi problems. Section 2 approves the principle of local contribution to the cost of flood control with specific exceptions. Section 3, paragraph one, obligates local interests to provide easements and rights of way and to assume responsibility for the maintenance and operation of the levee structures to be built under the Act. The second paragraph of Section 3 contains the language which now appears as Section 702c of Title 33. That paragraph reads as follows:

> "No liability of any kind shall attach to or rest upon the United States for any damage

> from or by floods or flood waters at any place; *Provided, however,* That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands."

The statute goes on to provide for acquisition of flowage rights by the United States, for participation [p. 113] of various Government agencies in work to be done under the Act, for distribution of funds in connection with the Mississippi program, for further reports and studies and, finally, for a limitation on the contribution of the United States to flood control measures proposed by the California Debris Commission for California rivers.

The no-liability language of Section 3 came into the Act as a result of a conference between the House and Senate managers and without explanation (see H. Rep. No. 1505, 70th Cong., 1st Sess.). But it is not difficult to identify the source of this provision. President Coolidge in his 1927 State-of-the-Union message (Cong. Rec. Sen., Dec. 7, 1927, p. 106) re-

viewed the problems created by the 1927 flood, proposed additional flood control legislation, and added words of caution about the position of the Government. He said:

> "It is necessary to look upon this emergency as a national disaster. It has been so treated from its inception. Our whole people have provided with great generosity for its relief. Most of the departments of the Federal Government have been engaged in the same effort. The governments of the afflicted areas, both State and municipal, can not be given too high praise for the courageous and helpful way in which they have come to the rescue of the people. If the sources directly chargeable can not meet the demand, the National Government should not fail to provide generous relief. This, however, does not mean restoration. The Government is not [p. 114] an insurer of its citizens against the hazard of the elements. We shall always have flood and drought, heat and cold, earthquake and wind, lightning and tidal wave, which are all too constant in their afflictions. The Government does not undertake to reimburse its citizens for loss and damage incurred under such circumstances. It is chargeable, however, with the rebuilding of public works and the humanitarian duty of relieving its citizens from distress."

This is clear enough: the Federal Government will extend its flood control program and provide relief where relief is needed; but it will not pay for flood damage. Section 3 was intended to put this point beyond argument. And it does so. There is no conflicting view. See *United States v. Sponenbarger,*

308 U.S. 256, 269 (1939); *Kincaid v. United States,* 35 F.2d 235, 246 (D.C. W.D. La., 1929).

Appellants argued in the Court below that Section 702c has no application in the Columbia River Basin. That argument has no force. 1. The 1928 Act, relating as it did to flood control on the Mississippi and Sacramento Rivers, related to all flood control work which the Government had undertaken in the past or was proposing for the future. Hence, in providing against liability in this statute, Congress was, in effect, providing against all liability. 2. The provision itself, referring as it does to "damage from or by floods or flood waters *at any place*", specifically negatives appellants' idea of a limited geographical application. 3. President Coolidge in his message to [p. 115] Congress was obviously suggesting policy for all flood activities of the Government, wherever located. 4. The Flood Control Act of 1936, which included provision for work in the Columbia River Basin, specifically affirmed all the provisions of the 1928 statute, thus making it plain that Section 702c has full application in the Columbia River Basin. Prior to 1936 the 1928 Act was amended from time to time in minor particulars (46 Stat. 787, 47 Stat. 810, 48 Stat. 607, 49 Stat. 1508); but there was no new general flood control legislation until that year. In 1936 Congress greatly extended the flood control activities of the Government approving many projects, including approximately fifty in the Columbia Basin (49 Stat. 1570, 1589). Congress was careful, however, to reaffirm the principles and provisions of the 1928 Act. Section 8 of the 1936 statute (49 Stat. 1570, 1596) provides:

> "Nothing in this Act shall be construed as repealing or amending any provision of the Act entitled 'An Act for the control of floods on the Mississippi River and its tributaries, and for other purposes', approved May 15, 1928, or any provision of any law amendatory thereof. * * *"

Thus it is beyond dispute that Congress intended that all provisions of the 1928 Act, including the no-liability provision, should apply in the Columbia Basin. Since 1936 there has been a variety of flood control statutes of one kind or another but nothing to modify this conclusion. (See 52 Stat. 1215, 53 Stat. 1414, 55 Stat. 638, 58 Stat. 887, 60 Stat. 641, 62 Stat. 1040). [p. 116]

Appellants argue that Section 702c has been modified by the Tort Act. This argument, as the Court below concluded, has no merit. 1. The Tort Act did no more than to waive the defense of sovereign immunity. It did not repeal existing acts of Congress or create claims against the United States which did not theretofore exist. *Feres v. United States,* 340 U.S. 135 (1950). 2. By its terms the Tort Act did not repeal or modify Section 702c and the most that could be said, therefore, is that there has been a repeal by implication. "But it is elementary that repeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only pro tanto to the extent of the repugnancy." *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439, 456 (1945); *United States v. Borden,* 308 U.S. 188, 198 (1939). It is uniformly held, moreover, that a later statute written in general terms, such as the Tort Act, will not (absent an

express provision) be construed to supersede an earlier specific statute, such as Section 702c relating to liability for flood damage. "It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute." *Rodgers v. United States,* 185 U.S. 83, 87 (1902); *Stewart v. United States,* 106 F. 2d 405, 408 (C.C.A. 9, 1939); *United States v. Hughes,* 116 F. 2d 171, 174 (C.C.A. 3, 1940); *The Town of Okemah v. United States,* 140 F. 2d 963, 965 [p. 117] (C.C.A. 10, 1944); *Home Owners Loan Corporation* v. *Creed,* 108 F. 2d 153, 155 (C.C.A. 5, 1939).

The provisions of 33 U.S.C.A. 702c are an absolute bar to these claims. [p. 118]

Legislative History, etc., of Title 33, U. S. Code, Section 702c.

(Excerpt from pages 15 through 21 of USA brief to 8th Circuit in *National Mfg. Co. v. United States*, 210 F.2d 263 (1954)).

B. THE TERMS OF SECTION 3 OF THE ACT OF MAY 15, 1928, 33 U. S. C. 702 (c), CONFIRM THE INTENT OF CONGRESS NOT TO SUBJECT THE UNITED STATES TO LIABILITY FOR FLOOD DAMAGE.

Still further support for the view that Congress did not intend to subject the United States to liability for flood damages is [p. 15] found in the unambiguous language of Section 3 of the Act of May 15, 1928, 45 Stat. 534, 536, 33 U. S. C. 702 (c). In precise language Section 3 declares that:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.

No broader or more emphatic language could, we submit, have been employed to exonerate the United States from flood-damage liability. The statutory language is unequivocal. The United States cannot be subjected to *any* kind of liability for *any* flood damage at *any* place. Congress undoubtedly knew that unless the exculpatory language was cast in comprehensive terms, attempts would be made, as they are being made here, to restrict its scope. And Congress carefully drafted the statute in all-inclusive language to forestall such attempts. It is for that reason that Congress expressly outlawed liability "of *any* kind." It is for that reason that Congress made it clear that the statutory immunity extended not only to claims for damages resulting directly or indirectly from floods but also to

those caused directly or indirectly by flood waters. And it is for that reason that the Congress, instead of placing any geographical limitation on the statute's applicability, used the language "at *any* place," to make certain that the statute would be applied generally and uniformly throughout the country wherever flood damage might be sustained.

That this literal language of Section 3 prohibits recovery of the damages here sought can scarcely be challenged. Indeed, the complaints in the consolidated cases concede, as they must, that the damages involved resulted from the fact that the "wares and mechandise (owned by the appellants) were flooded and inundated by the flood waters and oil, mud, muck and debris carried therewith" (R. N. 7, 8). Likewise, the *Shipley Company* complaint acknowledges that the damages sought resulted when the Kansas River "flooded the Central Industrial District and destroyed and damaged" that Company's personal property (R. S. 4, 5). These concessions, showing that the damages resulted from the flood or flood waters, establish the applicability here of Section 3's prohibition [p. 16] against federal liability. And they also establish the correctness of the decisions below in relying on Section 3 as a ground for dismissal of the complaints.

Three contentions are nevertheless advanced by appellants in endeavoring to avoid the impact of Section 3's bar against liability. First, it is argued that the prohibition applies only to floods occurring on the Mississippi River. Their second contention is that Section 3 of the 1928 Act immunizes the Government from liability only where the damage is proximately caused by the flood and that here the proximate causes were the negli-

gent predictions and assurances of safety by the Weather Bureau and Corps of Engineers. Finally, appellants contend that the 1928 Act was impliedly repealed by enactment of the Federal Tort Claims Act on August 2, 1946. There is no substance, we submit, to any of these contentions.

a. Appellants' first contention completely ignores Section 3's mandate that flood damage occurring *"at any place"* may *not* be compensated by the United States. As we have shown, Congress could not possibly have employed broader language to effectuate its purpose in making the statute applicable throughout the United States. Nor do appellants suggest any language more appropriate to achieve that end.

Nevertheless, they argue that this Court should strike out the all-inclusive statutory reference to damages occurring at "any place" and substitute instead a reference to damages occurring "along the Mississippi River." And, as justification for this argument, they point to the caption "Mississippi River" for Section 702 of Title 33, U. S. C., under which is codified Section 3 of the 1928 Act. But this caption was apparently derived from the Act of March 1, 1917, 39 Stat. 948, and *not* from the Act which contains the "no liability at any place" provision. The 1928 Act, unlike the 1917 Act, is not limited to the Mississippi but also applies to the tributaries of the Mississippi and to the tributaries of those tributaries. Thus, Section 10 of the 1928 Act expressly refers to the Mississippi *and* "the Missouri River and tributaries." 45 Stat. 534, 538.[9]

[9]The legislative history of the 1928 Act shows strong congressional concern with the need for having the Act apply not only to the Mississippi but to its tributaries and the rivers flowing into those tributaries. As origi- [p. 17]

Since the Kansas River is a tributary of the Missouri, which in turn is the chief tributary of the Mississippi, the "at any place" provision cannot, as contended by appellants, be restricted to the Mississippi but must be interpreted to also apply at least to those rivers, including the Kansas, which flow either directly or indirectly into the Mississippi.

There is more than the language contained in the 1928 Act which makes it plain that when Congress said "any place" it necessarily included floods on the Kansas River. In the Flood Control Act of 1936, which contained specific provisions concerning floods on the "Missouri River basin" and an express and detailed reference to "Kansas Citys on Missouri and Kansas Rivers in Missouri and Kansas" (49 Stat. 1570, 1588), Congress specifically affirmed all the provisions of the 1928 statute. Section 8 of the 1936 Act (49 Stat. 1570, 1596) provides:

> Nothing in this Act shall be construed as repealing or amending any provision of the Act entitled "An Act for the control of floods on the Mississippi River and its tributaries, and for other purposes,"

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nally introduced, the bill which became the 1928 Act was entitled "For the Control of Floods on the Mississippi River from the Head of the Passes to Cape Girardeau, Missouri, and Other Purposes (69 Cong. Rec. 5490)." This title was quickly objected to in Congress as being too limited, since the bill was intended to apply "not only to the Lower Mississippi but likewise on all the rivers which flow into the Mississippi" (69 Cong. Rec. 5489). Discussion in the Senate further showed that Congress intended the bill to apply not only to the Mississippi but also to "The Tributaries of the Mississippi and on Their Main Tributaries" (69 Cong. Rec. 5490). It was pointed out that "no plan for flood control in the Mississippi Valley can be adequate or acceptable" without "a complete system of Federal control of floods on the tributaries" (62 Cong. Rec. 5489-5490). Only by controlling floods on the tributaries can there be effective control on the main streams. For that reason, the limited reference to the portion of the Mississippi between the Head of the Passes and Cape Girardeau was stricken and the title broadened to read "For the Control of Floods on the Mississippi River and Its Tributaries, and for Other Purposes" (69 Cong. Rec. 5490) (45 Stat. 534).

approved May 15, 1928, or any provision of any law amendatory thereof. * * *

This specific affirmation completely wipes out any basis for challenging Section 3's applicability to the Kansas River flood claims asserted in the instant cases.

This 1936 statute also shows that appellants' reliance on the limited "Mississippi River" language in Section 702 of the United States Code is misplaced. A Code provision is, of course, only *prima facie* evidence of the law (1 U. S. C. 204 (a)). When, as here, it is inconsistent with the 1936 statute as it appears in the Statutes at Large, the latter must prevail. *Stephan v. United States,* 319 U.S. 423, 426; *Wong Yang Sung v. McGrath,* 339 U.S. 33, 51, note 33; see also *Balian Ice Cream Co. v. Arden Farms Co.,* 94 F. Supp. 796, 802 (S.D. Cal.). Accordingly, the fact that the words, "Mississippi River[10] have "lingered on in the successive editions of the United States Code is immaterial." Cf. *Stephan v. United States,* 319 U.S. 423, 426.

b. Equally lacking in merit is the contention that Section 3 applies only where the damages are proximately caused by floods or flood waters. That is not what the statute provides. To the contrary, its plain language bars federal liability for "damages from or by floods or flood waters." Statutory use of the word "from" in addition to the word "by" dissipates any doubt that the bar against liability applies to damages resulting from any situation in which floods or flood waters constitute a material or substantial factor. Use of the additional word "from" is the short and conclusive answer to the argument that the statute applies only where damage is proximately caused *by* floods or flood

waters.[10] It is significant here to note that where Congress, as in the Federal Tort Claims Act, did want to incorporate the rules of proximate causation it deliberately omitted the word "from" and referred to "damages * * * caused by" the employee's tortious conduct. 28 U. S. C. 1346(b).

Judge Fee's decision in *Clark v. United States,* 109 F. Supp. 213, 227 (D.C. Oreg.), holding Columbia River flood damage claims barred by Section 3 of the 1928 Act, weakens appellants' contention still further. That decision cannot be brushed aside, as appellants have attempted, on the ground that it "has [p. 19] no applicability to the facts in this case where the proximate cause of the damage was not the flood, but negligence in regard to the assurances issued." Appellants' Brief, *National Manufacturing* case, p. 37. Judge Fee's opinion and his printed pre-trial order in the *Clark* case shows very plainly that, as in the instant cases, it was there claimed that the damages were proximately caused not by the flood but by negligent assurances of safety by "withholding vital information with respect to danger to Vanport by flood," and by "failing and refusing to warn plaintiffs" of the impending flood. See *Clark v. United States,* 13 F. R. D. 342, 380, 109 F. Supp. 213, 225, 226 (D.C. Oreg.).

c. Nor is there any substance to the claim that Section 3 of the 1928 Act is not dispositive here because it was impliedly repealed by the Federal Tort Claims Act of August 2, 1946. "It is a cardinal principle of construction that repeals by implication are not favored." *United*

[10]Nor do we accept appellants' premise that the Kansas River flood was not the proximate cause of their damages. The allegations in their complaints, standing alone, show that the flood was in fact the proximate cause of the damages claimed in this litigation. (See *supra,* p. 16.) [p. 19]

States v. Borden Co., 308 U.S. 188, 198. In addition, the suggestion that there was an implied repeal is refuted by specific provisions of the Tort Claims Act which *expressly* repealed those earlier statutes Congress did intend the Tort Claims Act to supplant. Thus, Section 424(a) of the Tort Claims Act declares that a series of specifically described statutes "are hereby repealed" (60 Stat. 842, 846). The list of statutes expressly repealed does not include the 1928 Act (60 Stat. 842, 846, 847). If Congress had intended to repeal Section 3 of the 1928 Act, it would have been a simple matter to add that statute to the list of those expressly repealed. The omission of Section 3 from that list is persuasive evidence that it is in full force and in no way affected by enactment of the Tort Claims Act. See *Clark v. United States,* 109 F. Supp. 213, 227-228 (D.C. Oreg.).

C. Consistent Judicial Decisions Reflect This Traditional Congressional Policy Against Federal Liability for Flood Damage.

Flood damage suits against the United States are not novel. But, as is apparent from appellants' failure to refer to even one case in which recovery has been allowed, such claims have been uniformly rejected by the courts. *Bedford v. United States,* 192 U.S. 217; *Jackson v. United States,* 230 U.S. 1; *Sangui-* [p. 20] *netti v. United States,* 264 U.S. 146; *United States v. Sponenbarger,* 308 U.S. 256; *Goodman v. United States,* 113 F.2d 914 (C.A. 8).

This consistent result, reflecting traditional congressional reluctance to subject the United States to the enormous liability of flood damage claims, cannot be explained away on the basis of limitations in the Fifth

Amendment, nor on the ground that it is a consequence of the doctrine of sovereign immunity. Thus, flood damage claims, even though based on negligence, asserted against the Tennessee Valley Authority, which is subject to suit, are not maintainable. *Grant v. Tennessee Valley Authority,* 49 F. Supp. 564 (D.C. Tenn.). In granting defendant's motion for summary judgment, the court noted (49 F. Supp. 564, 566):

> By a long line of cases it has definitely been settled that neither the government nor its instrumentalities would have to respond in damages arising in the development and maintenance of waters for purposes of navigation and flood control, *including claims for negligence. It may be noted that this position is not because of governmental immunity from suit but on the grounds of public policy.* (Emphasis supplied.)

Similarly, in *Atchley v. Tennessee Valley Authority,* 69 F. Supp. 952, 954 (N.D. Ala.), a motion for summary judgment was again granted, the court pointing out that the principle of nonliability for flood damage "is not based upon the immunity to suit of the United States" and "applies whether the alleged liability is predicated on nuisance, negligence or other tortious conduct."

II

THERE IS NOTHING IN THE TORT CLAIMS ACT WHICH INDICATES THAT CONGRESS INTENDED TO DEPART FROM THE TRADITIONAL POLICY AGAINST FEDERAL LIABILITY FOR FLOOD DAMAGES

In the light of (1) the firmly established congres-

sional policy against indemnification of flood claims, (2) the direct prohibition against flood liability incorporated in Section 3 of [p. 21] the 1928 statute, 33 U. S. C. 702 (c), and (3) the consistent judicial decisions refusing to assess flood damage liability against the United States, we submit that it would require express and unequivocal language in the Federal Tort Claims Act to justify imposition of such liability under that Act. "If Congress had intended such a drastic change in the long established public policy [against federal responsibility for flood liability], it would have been more specific." *Grant v. Tennessee Valley Authority,* 49 F. Supp. 564, 566 (D.C. Tenn.). And, as similarly stated by the Supreme Court in rejecting for the same reason other negligence claims under the Federal Tort Claims Act, "We cannot impute to Congress such a radical departure from established law in the absence of express congressional command." *Feres v. United States,* 340 U.S. 135, 146.

We submit that the instant claims must be denied because there is no express congressional command in the Tort Claims Act on which appellants can rely in seeking to impose flood damage liability on the United States. We further submit that the express exceptions in the Tort Claims Act [Title 28, U. S. Code, Section 2680] apply to these claims, making it doubly clear that they are not cognizable under the Act. [p. 22]

Legislative History, etc., of Title 33, U. S. Code, Section 702c.

(Excerpt from pages 10 through 13 of USA brief to Supreme Court in opposition to petition for certiorari in *National Mfg. Co. v. United States*, 347 U.S. 967 (1954)).

ARGUMENT

The decision of the Court of Appeals in these Tort Claims Act cases is plainly correct. As noted in the opinions below, there are several independent and dispositive reasons for denying the claims. Some of these grounds are narrowly limited to flood cases of this precise type, and the broader grounds are in full accord with the rulings of this Court and of the other circuits.

1. The holding is firmly supported by the unambiguous language of Section 3 of the Act of May 15, 1928, 45 Stat. 534, 536, 33 U.S.C. 702c. In precise language, Section 3 declares that: [p. 10]

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *.

(a). No broader or more emphatic language could have been employed to exonerate the United States from flood-damage liability. The statutory language is unequivocal. The United States cannot be subjected to *any* kind of liability for *any* flood damage at *any* place. Congress undoubtedly knew that, unless the exculpatory language was cast in comprehensive terms, attempts would be made to restrict its scope. And, as observed by the court below, "Congressional anticipation" of such

attempts resulted in the statute's use of broad, all-inclusive language. (R.N. 34; R.S. 25.) It is undoubtedly for that reason that Congress, in Section 3, expressly outlawed liability "of *any* kind." Congress made it clear that the statutory immunity extended not only to claims for damages proximately caused by floods or flood waters but also, as the court below noted, to claims where the floods or flood waters were only a "substantial" or "material" factor in destroying or damaging property (R.N. 34; R.S. 25). And Congress, instead of placing any geographical limitation on the statute's applicability, used the language "at any place," to make certain that the statute would be applied "uniformly and throughout the country" wherever flood damage might be sustained (R.N. 34; R.S. 25).

That the language of Section 3 prohibits re- [p. 11] covery of the damages claimed by petitioners is apparent from the complaints. Five of the complaints concede, as they must, that the damages involved resulted from the fact that the "wares and merchandise [owned by the petitioners] were flooded and inundated by the flood waters and oil, mud, muck and debris carried therewith" (R.N. 7, 8). Likewise, the *Shipley Company* complaint acknowledges that the damages sought resulted when the Kansas River "flooded the * * * Central Industrial District and destroyed and damaged" that Company's personal property (R.S. 4, 5). These concessions, as the court below held, show that "the language of Section 3 plainly bars recovery against the United States." (R.N. 34, 38; R.S. 25, 29.)

(b). Congress has never departed from this "basic concept of nonliability" (R.N. 35, R.S. 26) adopted in

the Flood Control Acts.[5] On the contrary, the legislative history of bills considered by Congress "immediately following the [July 1951] flood shows even more conclusively congressional opposition to indemnification [for the flood damage] sought in the instant suits." (See the excerpts from the government's brief incorporated in the opinion below as fn. 3, R.N. 35, R.S. 26). The [p. 12] stark fact is, as shown by these excerpts, that these very claims were emphatically rejected by the Congress.[6]

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[5]It is also significant that, as the opinion below points out, while "Many attempts have also been made in the courts to impose liability upon the United States for flood damages * * * such claims have been uniformly rejected by the courts. *Bedford v. United States,* 192 U.S. 217; *Jackson v. United States,* 230 U.S. 1; *Sanguinetti v. United States,* 264 U.S. 146; *United States v. Sponenbarger,* 308 U.S. 256; *Goodman v. United States,* 8 Cir., 113 F. 2d 914." (R.N. 36-37; R.S. 27-28). See also *Grant v. Tennessee Valley Authority,* 49 F. Supp. 564, 566 (E.D. Tenn.); *Atchley v. Tennessee Valley Authority,* 69 F. Supp. 952, 954 (N.D. Ala.). [p. 12]

[6]Although more than a thousand cases are filed each year against the United States under the Federal Tort Claims Act, the instant suits seem to be the first and only attempts to obtain judgments against the United States on claims as to which Congress has earlier declared its express opposition. The usual pattern is the converse, *i.e.,* attempts to obtain legislative relief after judicial rejection of a claim. [p. 13]

stances to protect the Government. There have been times, I admit, when some have succeeded in defrauding the Government; and the cases of Fall and Sinclair as well as Doheny have shown that it is necessary to provide safeguards for the protection of the Government.

The CHAIRMAN. The question is on agreeing to the amendment offered by the gentleman from New York [Mr. LAGUARDIA].

The question was taken; and on a division (demanded by Mr. LAGUARDIA) there were—ayes 37, noes 110.

So the amendment was rejected.

The CHAIRMAN. The question recurs on the amendment offered by the gentleman from Wisconsin.

Mr. FREAR. That takes out the latter part of the section. Mr. Chairman, may we have the amendment again reported?

Mr. REID of Illinois. Mr. Chairman, I demand the regular order.

The CHAIRMAN. The regular order is on agreeing to the amendment offered by the gentleman from Wisconsin.

The question was taken, and the amendment was rejected.

The Clerk read as follows:

SEC. 3. Except when authorized by the Secretary of War upon the recommendation of the Chief of Engineers, no money appropriated under authority of this act shall be expended on the construction of any item of the project until local interests have given assurances satisfactory to the Secretary of War that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main-river levees; (b) agree to accept land turned over to them under the provisions of section 4.

With the following committee amendment:

In line 21, after the word "accept," insert the words "the title to."

The CHAIRMAN. The question is on agreeing to the committee amendment.

The committee amendment was agreed to.

Mr. MADDEN. Mr. Chairman, I offer an amendment.

Mr. REID of Illinois. Mr. Chairman, I have sent three amendments to the desk.

The CHAIRMAN. There are three amendments which will be disposed of, amendments which have been heretofore submitted and which the Clerk will report.

The Clerk read as follows:

Page 4, line 15, strike out the words "local interests" and insert in lieu thereof the words "the States or levee districts."

The CHAIRMAN. The question is on agreeing to the amendment.

The amendment was agreed to.

The CHAIRMAN. The Clerk will report the next amendment.

The Clerk read as follows:

Page 4, line 22, after the figure "4," change the period to a semicolon and insert the following as subparagraph (c):

"(c) Provide without cost to the United States all rights of way for levee foundations and levees on the main stem of the Mississippi River between Girardeau, Miss., and the Head of Passes."

The CHAIRMAN. The question is on agreeing to the amendment.

The amendment was agreed to.

The CHAIRMAN. The Clerk will report the next amendment.

The Clerk read as follows:

Page 4, line 22, after subparagraph (c), already adopted, add a new paragraph at the end of the section, as follows:

"No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."

The CHAIRMAN. The question is on agreeing to the amendment.

Mr. MADDEN. Mr. Chairman, I do not think this ought to be in this section of the bill. I do not think it should be attached to this section of the bill.

Mr. FREAR. This has been agreed on.

Mr. MADDEN. We agreed to it, but I do not think it should be made a part of this section.

Mr. GARRETT of Tennessee. Mr. Chairman, I offer an amendment to the amendment.

The CHAIRMAN. The gentleman from Tennessee offers an amendment to the amendment offered by the gentleman from Illinois, which the Clerk will report.

The Clerk read as follows:

Amendment offered by Mr. GARRETT of Tennessee to the amendment offered by the gentleman from Illinois [Mr. REID]: At the end of the amendment insert: "*Provided, however,* That if in carrying out the purposes of this act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct works for the protection of adjacent lands, and that such adjacent lands will be subject to damage by the execution of the general flood-control plan, it shall be the duty of the board herein provided to cause to be acquired on behalf of the United States Government either the absolute ownership of the lands so subjected to overflow or floodage rights over such lands."

Mr. GARRETT of Tennessee. Mr. Chairman, I am inclined to agree with the gentleman from Illinois [Mr. MADDEN] that the amendment which the gentleman from Illinois [Mr. REID] has proposed more properly would come in another section, but if it is to come now it seems to me that my amendment will have to come in connection with it at this place. I do not want to lose any rights in connection with it.

Mr. MADDEN. If the gentleman will yield, I am in favor of the amendment offered by my colleague, but I propose to strike out section 3 and offer a substitute to section 3, and I do not want to strike out that part of it.

Mr. REID of Illinois. That is the reason we had better get it in.

Mr. MADDEN. No. I will move to strike it out, anyway, if the gentleman wants to do it that way. I do not think it is fair; that is all. I think an amendment should be considered on its merits without any attempt to foreclose the right to have proper consideration of it. It does not matter how much power anybody has, it is just as well to exercise it with justice; and it does not make any difference how many votes you may have on a given proposition, it is well to exercise proper respect for the facts in the case.

Mr. REID of Illinois. Will the gentleman from Illinois yield?

Mr. MADDEN. Yes.

Mr. REID of Illinois. This was submitted at this place by the gentleman's conferees and we put it in at the gentleman's request.

Mr. MADDEN. The gentleman put it in, but it was not put in here at our request.

Mr. REID of Illinois. Yes; the gentleman ought to organize his conferees and know what he wants.

Mr. MADDEN. Now, I do not want to take up the time of the gentleman from Tennessee, but if we are going to consider the amendment which I have offered, and which has been pending, and which was pending before my colleague offered his amendment, we ought to do it before the gentleman's amendment comes along, because then it may be said that I have slept on my rights in offering this amendment here and that I no longer have any right to offer the amendment.

I want to move to strike out section 3, but I do not want to offer to strike out that part of the section, if the amendment is adopted, that the gentleman has just introduced but which has not been acted upon.

Mr. REID of Illinois. The gentleman can include it in his substitute.

The CHAIRMAN. The gentleman from Illinois can offer his amendment in that form.

Mr. MADDEN. Mr. Chairman, I would like to have my amendment read for information now, if I may.

The CHAIRMAN. Without objection, the Clerk will report for the information of the committee the amendment of the gentleman from Illinois.

The Clerk read as follows:

Amendment proposed by Mr. MADDEN: Strike out section 3 and substitute the following:

"SEC. 3. Except when authorized by the Secretary of War, upon the recommendation of the Chief of Engineers, no money appropriated under authority of this act shall be expended on the construction of any item of the project until the States or local interests to be benefited and protected have indicated their desire for Federal assistance by giving assurances satisfactory to the Secretary of War that they will, (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; (b) provide without cost to the United States such drainage work as may be necessary and the rights of way for the levees and other structures as and when the same are required. Work on the so-called Bonnet Carre spillway will be undertaken when the city of New Orleans, in recognition of its paramount interest therein, shall have undertaken to hold and save the United States from all damage claims arising out of the construction of the spillway. Work on the so-called New Madrid flood way will be undertaken when interests in southern Illinois and southeastern Missouri, in recognition of their paramount interest therein, shall jointly or severally have entered into a similar undertaking."

Mr. MADDEN. The question is whether this would come before the other amendments that are pending or before the amendment of the gentleman from Tennessee.

The CHAIRMAN. Perfecting amendments are to be disposed of before the amendment involving the striking out of the section is voted on. The question is on the amendment offered by the gentleman from Illinois, the chairman of the committee.

Mr. GARRETT of Tennessee. Mr. Chairman——

The CHAIRMAN. Does the gentleman from Tennessee desire recognition on his amendment?

Mr. GARRETT of Tennessee. I do, Mr. Chairman.

The CHAIRMAN. The gentleman from Tennessee is recognized.

Mr. GARRETT of Tennessee. Mr. Chairman, the situation which exists in Tennessee, I think, has come to be very, very well known to the membership of the House. Bear in mind that the Congress is officially adopting the Jadwin plan so far as the engineering part of that plan is concerned, plus a further consideration of the Mississippi River Commission's plan, with a view to combining the best parts of the two. Neither of these plans in any way promises anything to any part of Tennessee except injury. The only way I can see to meet the situation is in the way I am proposing here and in the language that is offered.

I appreciate, of course, the tremendousness of this problem, but I am sure every Member of the House who understands the situation realizes that we of Tennessee are not here as mendicants in this matter; we are simply here asking to be protected in our rights, and asking that our equities may be respected and worked out.

I very much hope, Mr. Chairman, the amendment may prevail.

Mr. COX. Mr. Chairman, I ask recognition on this amendment.

Mr. Chairman, if I understand the amendment offered by the gentleman from Tennessee, it is simply to take care of a limited territory here and there which is subjected to overflow as a result of the execution of this project; that is, subjecting lands to overflow as a result of the execution of these plans, which have not heretofore been overflowed by the flood waters of the river.

I have in mind, gentlemen—and I beg your attention to this statement—areas along the main river which will be damaged, in all probability, as a result of the execution of the plans, unless some work or works be constructed for the purpose of holding off flood waters. These are certain lands in the State of Tennessee which are limited in area, and lands in Kentucky, particularly the town of Hickman, which will be overflowed and damaged as a direct consequence of the proposed improvement. These areas and others similarly situated along the river should be protected.

Let me say, my colleagues, this amendment is not proposed for the purpose of obligating the Government to make good all damages that may result because of the execution of this project. The statement has been made by Members opposing the bill that they are not opposed to the Government paying or compensating for any land that is taken or that is damaged as a result of the execution of the project, which land would be immune from damage if the work proposed was not done. My friend, the gentleman from New York [Mr. LAGUARDIA], made the statement this morning, in effect, that he was willing that the Government be committed to the proposition of paying the damage that the Government might cause, and this amendment is to put the Government in the position where this can be done, so far as property along the main river is concerned.

Mr. LAGUARDIA. Will the gentleman yield?

Mr. COX. I will.

Mr. LAGUARDIA. Will the gentleman's amendment take care of the actual damage sustained or the prospective damages that might be sustained?

Mr. COX. No; the actual damage. The effect of the amendment is this, that where, in the execution of the Jadwin plan for flood control an area is endangered as the result of the work which it is impracticable to protect by any sort of flood-protective works the Government shall acquire either the absolute title to the land or flooded rights therein.

Mr. WHITTINGTON. Will the gentleman yield?

Mr. COX. Certainly.

Mr. WHITTINGTON. I would like to ask the gentleman from Georgia about what area the Government would have to acquire for flood rights?

Mr. COX. I am not in a position to state to the gentleman what the area in Tennessee might be.

Mr. WHITTINGTON. And elsewhere?

Mr. COX. This would not apply to any territory except that on the main stem of the stream.

Mr. GARRETT of Tennessee. It would apply to Tennessee and the Mississippi situation.

Mr. COX. Yes; and elsewhere along the Mississippi River proper.

Mr. REID of Illinois. Mr. Chairman, I ask unanimous consent that all debate on the pending amendment and section close in 15 minutes.

The CHAIRMAN. The gentleman from Illinois asks unanimous consent that all debate on the section and amendments close in 15 minutes.

Mr. O'CONNOR of Louisiana. I suggest to the gentleman that he make it 30 minutes.

Mr. REID of Illinois. I will make it 20 minutes.

Mr. LAGUARDIA. Will the gentleman make it apply to the pending amendment only? I have an amendment that I would like to get five minutes on, although I have a suspicion of what is going to happen.

Mr. O'CONNOR of Louisiana. Reserving the right to object, I want to ask the chairman of the committee if that would give any time to my colleague Mr. SPEARING and myself?

Mr. REID of Illinois. I do not know.

Mr. O'CONNOR of Louisiana. Then I object. Members who do not live in this flooded locality can get an hour or an hour and a half, but Members who live in the territory affected, in the valley of the Mississippi River, can not get five minutes; it is ridiculous.

Mr. REID of Illinois. Mr. Chairman, I move that all debate on this section and all amendments thereto close in 30 minutes.

Mr. DENISON. A parliamentary inquiry, Mr. Chairman. Does that apply to amendments that are not yet offered?

The CHAIRMAN. It applies to the section and all amendments.

Mr. WINGO. Mr. Chairman, I offer an amendment to the amendment of the gentleman from Illinois, that all debate on this section and amendments thereto close in 10 minutes.

Mr. SPEARING. And I offer an amendment to the amendment striking out 10 minutes and making it 1 hour.

The CHAIRMAN. That amendment is an amendment to an amendment to an amendment, and therefore not in order. The question is on the amendment offered by the gentleman from Arkansas to the amendment offered by the gentleman from Illinois [Mr. REID.]

The question was taken; and on a division, there were 35 ayes and 87 noes.

So the amendment to the amendment was rejected.

The CHAIRMAN. The question now is on the amendment of the gentleman from Illinois to close debate on the section and all amendments thereto in 30 minutes.

The question was taken, and the amendment was rejected.

Mr. MADDEN. Mr. Chairman, I rise to discuss the amendment I have offered.

The CHAIRMAN. The amendment pending should be disposed of before further amendments are offered. The question is on the amendment offered by the gentleman from Tennessee [Mr. GARRETT] to the amendment offered by the gentleman from Illinois, chairman of the committee.

The question was taken; and on a division (demanded by Mr. GARRETT of Tennessee) there were 111 ayes and 79 noes.

So the amendment of Mr. GARRETT of Tennessee to the amendment was agreed to.

The CHAIRMAN. The question recurs on the amendment of the gentleman from Illinois as amended by the amendment of the gentleman from Tennessee.

The question was taken, and the amendment as amended was agreed to.

The CHAIRMAN. The gentleman from Illinois [Mr. MADDEN] offers an amendment, which the Clerk will again report.

The Clerk read as follows:

Amendment by Mr. MADDEN: Strike out section 3 and substitute the following:

"SEC. 3. Except when authorized by the Secretary of War upon the recommendation of the Chief of Engineers, no money appropriated under the authority of this act shall be expended on the construction of any item of the project until the States or local interests to be benefited and protected have indicated their desire for Federal assistance by giving assurances satisfactory to the Secretary of War that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees, (b) provide without cost to the United States such drainage works as may be necessary, and the rights of way for all levees and other structures as and when the structures are required. Work on the so-called Bonnet Carre spillway will be undertaken when the city of New Orleans, in recognition of its paramount interest therein, shall have undertaken to hold and save the United States from damage claims arising out of the construction of the spillway. Work on the so-called New Madrid flood way will be undertaken when interests in southern Illinois and southeast Missouri, in recognition of their para-